

LETTER OPINION
94-L-254

October 4, 1994

Mr. Jerry Renner
Kidder County State's Attorney
Steele, ND 58482

Dear Mr. Renner:

Thank you for your August 23, 1994, letter regarding the meaning of Section 40-5020 in the Revised Code of 1943. Section 40-5020 in the Revised Code of 1943 is the same as N.D.C.C. ? 40-50-20 in North Dakota Century Code volume 8A (copyright 1983). (N.D.C.C. ? 40-50-20 has since been repealed and its substance has been recodified in N.D.C.C. ? 40-50.1-16.) Section 40-5020 provides:

40-5020. Vacation of Plats Before Sale of Lots; Where Lots Sold; Effect. Before the sale of lots therein, a plat of any municipality, or of any addition thereto, or a subdivision of land, may be vacated by the proprietors by a written instrument declaring the plat to be vacated. Such instrument shall be executed, acknowledged or proved, and recorded in the office in which the plat to be vacated is recorded. The execution and recording of such instrument shall destroy the force and effect of the recording of the plat which is so vacated and shall divest all public rights in the streets, alleys, and public grounds laid out as described in the plat. In cases where lots have been sold, a plat may be vacated by all the owners of the lots in the plat joining in the execution of the instrument declaring the vacation.

R.C. 1943, ? 40-5020.

You indicate that a declaration of vacation of a part of a plat was filed by an individual with the county register of deeds in 1952. Your question is as follows:

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Under Section 40-5020, if an owner of land plats a subdivision of a municipality, files the plat and sells lots, can the purchaser of some, but not all, of said lots vacate a portion of the plat as to the lots he owns by simply preparing and recording a written instrument declaring a portion of the plat to be vacated as provided in the first sentence of Section 40-50-20?

Section 40-5020 addresses the vacation of an entire plat before the sale of lots therein, and the vacation of an entire plat after the sale of lots therein. You have indicated that your situation involves the vacation of a part of a plat, and not the entire plat.

Therefore, it is Section 40-5024 that applies, and not Section 40-5020. See, City of LaMoure v. Lasell, 145 N.W. 577, 581 (N.D. 1914) (applying predecessor to Section 40-5024 where part of plat was claimed to have been vacated). Section 40-5024 in the Revised Code of 1943 is the same as N.D.C.C. ? 40-50-24 in North Dakota Century Code volume 8A (copyright 1983). (N.D.C.C. ? 40-50-24 has since been repealed and its substance has been recodified in N.D.C.C. ? 40-50.1-16.) Section 40-5024 provides:

40-5024. Part of a Plat May be Vacated. Any part of a plat may be vacated under the provisions and subject to the conditions of this chapter if the vacating does not abridge or destroy any of the rights and privileges of other proprietors in the plat. This chapter shall not authorize the closing or obstructing of any public highways laid out according to law.

R.C. 1943, Section 40-5024.

The owner of a part of a plat may vacate the part owned without the approval of the owners of other lots in the plat provided that the vacating does not harm their rights. Hille v. Nill, 226 N.W. 635, 638 (N.D. 1929). Further, if the other owner or owners of lots in the platted subdivision do not object before the appropriate limitations period has run, they will lose any rights they may have possessed. Id. at 639.

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Whether an attempted vacation of a part of a plat is effective against the public, against other owners in the plat, or against other parties affected, depends on certain factors.

Whether an attempted vacation of a part of a plat is effective against the public depends on whether there has been acceptance by the public of the dedication to the public in the plat of any parks, streets, or alleys, etc. Hille v. Nill, 226 N.W. at 637-638. An attempted vacation was effective against the public where there was no acceptance by the public of a dedication. Id. at 637. Acceptance, however, need not be by formal words, but may be by acts, conduct, or words showing an intention to accept. Ramstad v. Carr, 154 N.W. 195, 201-202 (N.D. 1915). Planting trees on land designated as a park shows acceptance. Id. at 198, 203. In City of Grand Forks v. Flom, 56 N.W.2d 324, 328 (N.D. 1952), the North Dakota Supreme Court determined that there had been acceptance of the dedication to public use of a street and an alley "by the city in grading and maintaining the street and keeping it open for public use." Therefore, an attempted vacation of a part of the plat was not effective against the city. Id. at 328. In City of LaMoure v. Lasell, 145 N.W. 577 (N.D. 1914), the North Dakota Supreme Court discussed the types of actions taken by a city (i.e., the public) that may constitute acceptance of a dedication to the public of streets, alleys and parks. Id. at 580.

An attempted vacation of a part of a plat may or may not be effective against other owners of lots in the plat. See Hille v. Nill, 226 N.W. 635 (N.D. 1929) (the attempted vacation was effective against owners of other lots in the plat); City of Grand Forks v. Flom, 56 N.W.2d 324 (N.D. 1952) (the attempted vacation was not effective against owners of other lots in the plat); and City of LaMoure v. Lasell, 145 N.W. 577, 581 (N.D. 1914) (the court discussed reliance by owners of other lots in the plat on the dedication to the public of streets, alleys, and parks, so that an attempted vacation might not be effective).

Despite an attempted vacation by an owner of a part of a plat, an interested person, even though that person is not an owner of any other lots in the plat, may have acquired rights in the part of the plat attempted

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to be vacated. See Hille v. Nill, 226 N.W. at 639. In Hille, an owner of land outside the plat had acquired an easement to use a road across the portion of the plat attempted to be vacated, and the easement continued despite the vacation of the road when the plat was vacated. Id.

Finally, you ask about the meaning of the word "proprietor" in Section 40-5020. The word "proprietor" as it is used in this section is not defined in the North Dakota Century Code. "Words used in any statute are to be understood in their ordinary sense . . ." N.D.C.C. ? 1-02-02. The dictionary definition of a proprietor is "[a] person who has legal title to something; owner." Am. Heritage Dictionary 994 (2d coll. ed. 1991). Thus, it is my opinion that a proprietor, as it is used in this part of the North Dakota Century Code, means "owner," either the owner who platted the lots or the purchasers of the lots. See, for example, the usage of the word proprietors at Section 40-5025 of the Revised Code of 1943 (" . . . the proprietors of the lots vacated . . .").

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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